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No. 91-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH LAND TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

CAROLYN BURNS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly followed this Court's holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), in ruling that state law consumer class actions should be remanded to state court, where the claims were based on the Pennsylvania consumer protection statute and common law, and defendants' alleged violation of a federal statute was an element of the state law claims.

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COUNTER-STATEMENT OF THE CASE

Because the District Court's final judgment order, vacated by the Court of Appeals, granted a Motion to Dismiss under Fed.R.Civ.P. 12(b)(6), the allegations of the Complaints must be accepted as facts.

The plaintiffs are individuals who sold homes after November 10, 1988. [Complaints, App. 6a, 60a, 82a, 105a]. That date is the effective date of the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647 ["TAMRA"]. TAMRA added the following to the Internal Revenue Code's reporting provisions governing real estate transactions, at subsection (e) of 28 U.S.C. § 6045:[1]

> **(3) Prohibition of separate charge for filing return.**-- It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

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[1] Section 6045(e) was added to § 6045 in 1986. Act of Oct. 22, 1986, P.L. 99-514, § 1521(a), 100 Stat. 2746. This subsection extended § 6045(a) and (b)'s reporting requirements, previously imposed on "brokers," to real estate transactions. The new provision identified the party handling the closing who was required to give 1099-type forms to homesellers and file information returns with the IRS, showing the proceeds of home sales.

It is undisputed that this statute, as amended, did not give homesellers a private federal cause of action to recover illegally charged fees.

The defendants were "real estate reporting persons" who provided the IRS information statements mandated by § 6045(e)(1). [Complaints, App. 4a-5a, 57a-59a, 79a-81a, 101a-03a]. Each defendant collected a charge for "IRS reporting," although the charge was not shown as a separate line item on the settlement sheets. [Complaints, App. 6a, 61a, 105a, 83a].

Under the Pennsylvania regulations governing title services, a title company or affiliated abstract company may charge a "disbursement fee" for the clerical service of issuing checks from the proceeds of a home sale. The permissible amount of that charge depends on the number of checks issued, to a maximum of $15.00. [Complaints, App. 61a, 83a, 105a].

Each defendant collected a combined IRS reporting and disbursement fee exceeding $15.00. While the precise amount each defendant collected for "IRS reporting" (as opposed to the "disbursement fee") has not yet been established, the total amounts charged to the various plaintiffs varied from $17.50 to $50.00.

The common law counts of the Complaints sought recovery of the fees, with interest and punitive damages, on grounds that defendants were liable for conversion, unjust enrichment, and money had and received. [Complaints, App. 7a, 62a, 83a, 106a]. The statutory

counts alleged that defendants' conduct was unfair and deceptive within the meaning of Pennsylvania's Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat. § 201-2(4) ["UTPCPL"]. Plaintiffs stated a private cause of action expressly provided by the UTPCPL, 73 Pa.Stat. § 201-9.2(a), providing triple damages and additional remedies. [Complaints, App. 9a, 64a, 85a-86a, 108a].

In the final counts of their Complaints, plaintiffs sought to represent a class of similarly situated homesellers who were charged an IRS reporting fee since November 10, 1988. [Complaints, App. 10a, 64a, 86a, 112a].

Thus, the underlying dispute is between two sets of private parties, homesellers versus the providers of real estate closing services.[2] No party has raised any issue or concern about the performance of any tax reporting or collecting duties, or the accuracy of the returns, or the validity of state rules or federal law. The homeseller plaintiffs simply seek civil damages under

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[2] Plaintiffs contended below that the ban on "separate" charges was violated when defendants added a specific amount to a line item in the closing charges and that evident Congressional intent to prevent profiteering for complying with the reporting requirements could not be so easily frustrated. Defendants contended that they could conceal the breakdown of the distinct charge for IRS reporting from the consumer, by adding it to a "disbursement fee," and thereby complied with the statute while charging whatever amount they pleased.

state law arising from an allegedly improper settlement charge imposed by the title companies.

In applying the principles identified by this Court in *Merrell Dow*, to hold that the title companies improperly removed these class actions, the Third Circuit Court of Appeals made the following observation:

> Moreover, in this case, no matter what interpretation the Pennsylvania courts might give this particular provision of the Internal Revenue Code, it will have no effect whatsoever on the collection of tax by the United States. No federal precedent will be set by state courts in this circumstance, so even inconsistent interpretations of this provision among the states will not affect federal jurisprudence in any way. It is simply that Pennsylvania plaintiffs have pleaded a state-law cause of action for violating a provision of federal law for which there is otherwise no private right of action.

957 F.2d 90, 94 (App., 14a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S RULING IS A STRAIGHTFORWARD, CORRECT APPLICATION OF THIS COURT'S *MERRELL DOW* DECISION

A. *Merrell Dow* Decision Was Not Ambiguous In Identifying Congressional Intent As Decisive Factor To Substantiality Of Federal Issue For Jurisdictional Purposes

In holding that federal question jurisdiction was absent in these cases, the Court of Appeals for the Third Circuit honored both the letter and intent of this Court's 1986 decision in *Merrell Dow*. This Court's explicit ruling left no doubt that what the District Court termed "indirect" federal question jurisdiction — where an issue of federal law was merely an element of a state law cause of action — could only be found in exceptional circumstances.

Far from misinterpreting *Merrell Dow*, the Third Circuit took this Court's opinion to mean what it said and applied the plain, compelling language of that decision:

> The significance of the necessary assumption that there is no federal private

> cause of action thus **cannot be overstated**. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think **it would similarly flout, or at least undermine**, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.

478 U.S. at 811-12 (emphasis added). This passage is important because it undermines the Petitioners' argument that labelling the violation of a federal statute as a "necessary" or "essential" element of the state law causes of action overrides the fact that Congress has not seen fit to express or imply a federal remedy. This explains why it is the Petitioners, not the Court of Appeals, who have misinterpreted *Merrell Dow*'s relationship to prior case law.[3]

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[3] The line of cases from *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) to *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) remain valid for their (continued...)

Elsewhere in *Merrell Dow*, this Court reinforced this point, stating:

> Given the significance of the assumed congressional determination to preclude federal private remedies, the **presence of the federal issue as an element of the state tort is not the kind of adjudication** for which jurisdiction would serve congressional purposes and the federal system. . . . the congressional determination that there should be no federal remedy for the violation of this

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[3](...continued)

recognition that only a "substantial" federal issue will support federal-question jurisdiction. But the fact that these cases were not overruled in *Merrell Dow* does not mean that they stand for a distinct, alternative basis for subject-matter jurisdiction, under which the "congressional determination" whether to provide an federal remedy is irrelevant.

Rather, the holding of *Merrell Dow* requires that the question whether the issue in a given case is "substantial", thereby meeting the established criterion, must now be analyzed with reference to the signal significance of the Congressional mandate. The strong terms — "cannot be overstated," "flout", "tantamount" — which this Court employed to describe the importance of the legislative factor make this conclusion irresistible. "Federal courts cannot create indirectly what Congress did not provide directly — namely, a federal forum for the privately asserted federal violations in this case." *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196, 199 (4th Cir., 1991), *cert. denied*, 112 S.Ct. 1173 (1992).

> federal statute is **tantamount** to a congressional conclusion that the **presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial"** to confer federal-question jurisdiction.

478 U.S. at 814 (emphasis added). The final holding of the *Merrell Dow* opinion contained no ambiguity:

> We conclude that **a complaint alleging a violation of a federal statute as an element** of a state cause of action, when Congress has determined that there should be **no private, federal cause of action** for the violation, **does not state a claim "arising under** the Constitution, laws, or treaties of the United States."

478 U.S. at 817 (emphasis added).

Given this mandate, the Court of Appeals did not err in declining the Petitioners' invitation to search for a basis to "flout" manifest Congressional intent. Congress' determination that the new ban on IRS reporting charges need not be administered by the federal judiciary is especially fitting in the context of real estate transactions.

B. State Law Consumer Class Actions Over Real Estate Closing Costs Belong In State Court

In these lawsuits between private consumers and title insurance companies, the greatest out-of-pocket losses sought by any named plaintiff is less than $50, before considering the effect of treble damages and the $100 minimum award under the Pennsylvania consumer protection statute. 73 Pa.Stat. § 201-9.2(a). As the Third Circuit Court noted, whatever decision the state court may make in adjusting the allegedly illegal closing costs between these private parties, there will be no impact on the compilation of information or collection of taxes by the Internal Revenue Service.

In our federal system, of all matters which are committed to the states, perhaps the most appropriately so committed are the systems for protecting and transferring ownership of the very real estate over which each state is sovereign.

Thus, when federal law regulated abuses of concealment and overcharging in closing costs, Congress was careful to preserve the states' autonomy.

The savings clause of the Real Estate Settlement and Procedures Act, 12 U.S.C. § 2601 et seq, provides that all state laws with respect to settlement practices are unaffected (unless inconsistent with federal law, and then only to the extent of the inconsistency, and a state law

cannot be inconsistent if it provides greater protection). 12 U.S.C. § 2616.

Given this public policy background, it can be inferred that Congress made a prudent and informed decision, when banning "separate charges" in the TAMRA amendment, to leave enforcement of this ban to the states' existing, extensive scheme of regulation.

In *Merrell Dow*, this Court explained why the basis for federal question jurisdiction avowed by the Petitioners is so fragile:

> Indeed, the very reasons for the development of the modern implied remedy doctrine — the "increased complexity of federal legislation and the increased volume of federal litigation," as well as "the desirability of a more careful scrutiny of legislative intent," *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377, 102 S.Ct. 1825, 1838, 72 L.Ed.2d 182 (1982) (footnote omitted) — are precisely the kind of considerations that should inform the concern for "practicality and necessity" that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action.

Merrell Dow, 478 U.S. at 811-12.

These concerns are illustrated in the present cases, consumer class actions where the basic claim for most class members is unlikely to exceed the $100 minimum award under the Pennsylvania Consumer Protection Act. There is no **practical** benefit in forcing federal courts to adjudicate thousands of claims arising from separate home sales transactions, based on state common law and statutory law controlling the remedies.

And since title companies doing business nationwide manage with fifty different systems of deed recording, indexing, transfer taxation, escrowing, and insurance regulation, they will certainly be able to adapt their procedures if different states were to vary in applying the ban on "separate charges". There is no **necessity** for federal courts to interpret the meaning of "separately charge," even assuming that federal jurisdiction would infallibly promote uniformity.

Moreover, there is no reason to assume that inconsistent interpretations are more likely to develop in the state courts than in lower federal courts. This Court's certiorari review is equally possible from either forum. As this Court pointed out in *Merrell Dow*, such review is available if inconsistent interpretations among state courts were to threaten important federal interests. 478 U.S. at 816.

II. PURPORTED "CONFLICT" BETWEEN CIRCUITS ONLY REFLECTS TRULY EXCEPTIONAL CHARACTER OF STATE LAW CASES WARRANTING FEDERAL JURISDICTION

Merrell Dow sufficiently clarified the boundaries of federal-question jurisdiction over state law claims alleging violations of a federal statute as an element of the claim, where there is no private federal remedy. A Westlaw search for decisions from all federal courts, issued from January 1, 1992 until May 29, 1992, revealed only two rulings of the Circuit Courts of Appeals citing *Merrell Dow* in connection with a jurisdictional question, not counting the Third Circuit's decision in the present case.[4] An additional five District Court decisions were reported in the same period.[5]

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[4] *Hudson Insurance Co. v. American Electric Corp.*, 957 F.2d 826 (11th Cir., 1992) (underlying question one of state, not federal, law); *Cable Television Association Of New York v. Finneran*, 954 F.2d 91 (2d Cir. 1992) (injunctive relief supports federal jurisdiction, so substantiality of federal issues need not be decided).

[5] *Coardes v. Chrysler Corporation*, 785 F.Supp. 480 (D. Del. 1992) (negligence claim against vehicle manufacturer did not arise under federal law); *Stone v. Williams*, 1992 WL 96197 (M.D. Ala. 1992) (suit to enforce state-court judgment allocating share of legendary country singer's estate remanded to state court); *Platzer v. Sloan-Kettering Institute for Cancer Research*, 1992 WL 62134 (S.D.N.Y. 1992) (implied federal remedy claim supported

(continued...)

Only one of these decisions evidenced any inconsistency in interpreting or applying the principles outlined in *Merrell Dow*.[6] This hardly suggests a volume of

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[5](...continued)

finding of jurisdiction); *Ore-Ida Foods v. Richmond Transportation Services*, 783 F.Supp. 382 (N.D. Ill., 1992) (shipper's action against insurers for damaged goods dismissed); *Laubach v. Howard Trucking Co.*, 1992 WL 28107 (E.D.La. 1992) (tort suit alleging violations of trucking safety regulations remanded where Congress did not create federal remedy for such violations).

[6] *Platzer v. Sloan-Kettering*, 1992 WL 62134, was a claim by medical researchers for a larger share of royalties on their discovery. The District Court found federal jurisdiction present over three counts based on a federal statute requiring non-profit organizations which accept federal funding to share royalties which inventors. The first count asserted an implied direct right of action under the federal statute, for which "it is well settled that . . . federal courts have the requisite federal jurisdiction to determine whether such a federal remedy exists." 1992 WL 62134, at *3.

Although rejecting the implied remedy claim on its merits, the District Court went on to exercise jurisdiction over the second and third counts, on grounds that "the federal issue is essential to Plaintiffs' breach of contract and third-party beneficiary claims." In so holding, the *Paltzer* court cited *Milan Express* and the decision of the District Court, since reversed, in the present case. *Id.* at *6.

Because *Paltzer*, unlike this case, did present an issue whether the federal statute provided an implied private right of action, the federal question was far more substantial and significant

(continued...)

controversy or confusion warranting renewed attention by this Court.

Scrutiny of the cases discussed by Petitioners reveals that only one of those decisions actually upheld federal-question jurisdiction in the absence of a federal remedy — *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989). In that case, the Sixth Circuit panel majority, over a vigorous dissent, found jurisdiction under 28 U.S.C. § 1337(a) over claims based on surety bonds which were "created on federal forms, administered under federal regulations, and required by a federal statute." Thus, the transaction in that case was entirely a creature of federal law. Here, in contrast, real estate transactions are controlled and primarily regulated by state law.

Whether or not *Milan Express* was correct in asserting federal jurisdiction, standing alone that decision does not warrant certiorari review of the ruling in this case.

The remaining cases cited by Petitioners, where federal jurisdiction was found, uniformly presented

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[6](...continued)

there. The rarity of cases comparable to *Paltzer*, in either factual patterns or jurisdictional holdings, illustrate that the issue asserted in the Petition for Certiorari is not ripe for review. The great majority of courts have been faithful to the straightforward language of *Merrell Dow*.

additional bases for jurisdiction, frequently in the form of a companion federal remedy.[7] Thus, Petitioners' effort to demonstrate a conflict among the circuits relies on extrapolation from *dicta* and inference.

Merrell Dow has not left an unsettled question of great importance requiring still more clarification from this Court. Instead, *Merrell Dow* has endowed federal-question jurisprudence with a widely and consistently applied rule. Such clear guidance is especially welcome in the complex area of federal-question jurisdiction.

A spirit of deference to Congressional intent underlies the rationale of *Merrell Dow*. Hence, Congressional acquiescence in the six years since that decision is especially significant. Congress has the ability, when it legislates in any given subject area, to expressly vest subject-matter jurisdiction in the federal courts, and knows, pursuant to *Merrell Dow*, that interpretation and enforcement may be left to state courts

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[7] The latest decision from the Second Circuit did not reach the question whether the federal issues involved in state cable television regulations were sufficient to warrant federal question jurisdiction, but suggested that they would not be. *Cable Television Association Of New York v. Finneran*, 954 F.2d at 94, citing *Nashoba Communications v. Town of Danvers*, 893 F.2d 435, 438 (1st Cir. 1990) (no substantial federal issue in cable company's federal pre-emption challenge to municipal enforcement of rate freeze). Thus, the Second Circuit has yet to decide a case which squarely raises a question of *Merrell Dow*'s "unreserved application."

unless it does so. It is for Congress in the first instance, exercising its legislative function, to balance the federal interests and determine the limits of federal jurisdiction over civil claims involving violations of federal laws.

Thus, *Merrell Dow* gives certainty and predictability to the jurisdictional implications of Congressional action in specific subject areas. Furthermore, if Congress concluded that the general rule of *Merrell Dow* unduly limited the ability of federal courts to extend subject-matter jurisdiction on a case-by-case basis, Congress could have revised the Judicial Code to broaden so-called "indirect" federal question jurisdiction. However, Congress has **narrowed** such jurisdiction in the context of removal. In 1990, 28 U.S.C. § 1441(c) was amended to give the District Court discretion to remand "all matters in which State law predominates," even if a clear basis for federal jurisdiction exists. P.L. No. 101-650 (December 1, 1990). *Martin v. Drummond Coal Co., Inc.*, 756 F.Supp. 524, 526 (N.D. Alabama 1991) (amendment reflects consensus on need to subtract substantially from removal jurisdiction). This amendment, in and of itself, further lessens the need for further refinement of doctrine on the remote boundaries of federal question jurisdiction.

In conclusion, the Third Circuit correctly followed the express holding of this Court in *Merrell Dow* when it held that these state law class actions should be remanded to state court. If, as a theoretical matter, exceptionally compelling circumstances will still permit

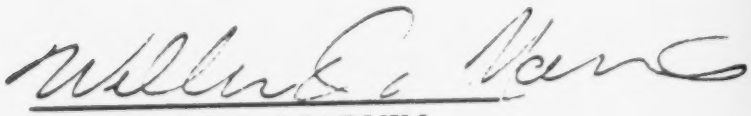
federal-question jurisdiction in the absence of a federal remedy, the boundaries of such exceptional circumstances should be defined in the context of a case which arguably presents them.

This is manifestly not such a case.

III. CONCLUSION

For the reasons discussed above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,



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